

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
ABRAHAM TORRES,
Defendant.

Case No.: 12-cr-4826-GPC-2

**ORDER DENYING MOTION FOR
REDUCTION OF SENTENCE
UNDER USSG § 1B1.10 AND
AMENDMENT 782 (2014)**

[ECF No. 34]

I. INTRODUCTION

On October 25, 2013, Abraham Torres (“Defendant”) was sentenced to a custodial term of 37 months for a conviction of distribution of methamphetamine. (*See* ECF No. 72.) Defendant originally received a fast-track downward departure under USSG § 5K3.1 and downward departures for age under § 5H1.1, family ties under § 5H1.6, and mitigating circumstances under § 5K2.0. In 2014, the United States Sentencing Commission promulgated Amendment 782 (“Drugs Minus 2”), which, effective November 1, 2014, lowered the base offense levels for most drug quantities in USSG § 2D1.1(c), and made this change retroactive via Amendment 788. *See also* USSG § 1B1.10(c).

On December 8, 2014, Defendant filed a Motion for Reduction of Sentence under 18 U.S.C. § 3582(c). (ECF No. 82.) On May 28, 2015, the Government filed its response asserting that Defendant is ineligible for any reduction because the lower limit of the

1 amended guideline range is higher than Defendant's originally imposed sentence. (ECF
2 No. 84.)

3 Finding that Defendant's current sentence is below the low-end of the amended
4 guideline range, the Court **DENIES** Defendant's Motion for Reduction of Sentence.

5 **II. DISCUSSION**

6 **A. Modification of Sentence Under 18 U.S.C. § 3582(c)**

7 Generally, a federal court "may not modify a term of imprisonment once it has been
8 imposed." 18 U.S.C. § 3582(c). An exception to that rule lies "in the case of a defendant
9 who has been sentenced to a term of imprisonment based on a sentencing range that has
10 subsequently been lowered by the Sentencing Commission." § 3582(c)(2). When the
11 Commission makes a Guidelines amendment retroactive, 18 U.S.C. § 3582(c)(2)
12 authorizes a district court to reduce an otherwise final sentence that is based on the
13 amended provision. Any reduction must be consistent with applicable policy statements
14 issued by the Sentencing Commission. *Id.*

15 Amendment 782 to the United States Sentencing Guidelines, effective November 1,
16 2014, lowered the penalties for most drug offenses by reducing the offense level in the
17 § 2D1.1 Drug Quantity Table by two levels. In Amendment 788, the Sentencing
18 Commission decreed that Amendment 782 may be applied retroactively to lower the
19 sentences of previously sentenced inmates.

20 In *Dillon v. United States*, 560 U.S. 817, 826-27 (2010), the Supreme Court set forth
21 a two-step inquiry for assessing a motion for reduction of sentence under § 3582(c). *Id.*

22 At step one, § 3582(c)(2) requires the court to follow the Commission's
23 instructions in § 1B1.10 to determine the prisoner's eligibility for a sentence
24 modification and the extent of the reduction authorized. Specifically,
25 § 1B1.10(b)(1) requires the court to begin by "determin[ing] the amended
26 guideline range that would have been applicable to the defendant" had the
27 relevant amendment been in effect at the time of the initial sentencing. "In
28 making such determination, the court shall substitute only the amendments
listed in subsection (c) for the corresponding guideline provisions that were
applied when the defendant was sentenced and shall leave all other guideline
application decisions unaffected."

* * * * *

At step two of the inquiry, § 3582(c)(2) instructs a court to consider any applicable § 3553(a) factors and determine whether, in its discretion, the reduction authorized by reference to the policies relevant at step one is warranted in whole or in part under the particular circumstances of the case.

B. Determination of Amended Guideline Range

Under § 1B1.10, a defendant is eligible for a sentencing modification when an amendment listed in § 1B1.10(d) lowers “the guideline range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance.” USSG § 1B1.10 n.1(A). § 1B1.10(b)(2) confines the extent of the reduction authorized. Once the Court determines the amended guideline range, it “shall not reduce the defendant's term of imprisonment . . . to a term that is less than the minimum of the amended guideline range.” *Id.* § 1B1.10(b)(2)(A). The only exception to this prohibition applies if the defendant previously received a downward departure “pursuant to a government motion to reflect the defendant's substantial assistance to authorities.” In that case, the Court may apply “a reduction comparably less than the amended guideline range.” *Id.* § 1B1.10(b)(2)(B).

As Amendment 782 is listed in § 1B1.10(d), the Court must determine the “amended guideline range” that would have been applicable to the defendant had Amendment 782 been in effect at the time of the sentence. USSG § 1B1.10(b)(1). Defendant has calculated his “amended guideline range” by including a reduction for the fast-track and combination of circumstances departures.

The Court finds that Defendant’s position is irreconcilable with the applicable Sentencing Commission comments. Note 1(A) to § 1B1.10 specifically states that the amended guideline range “is determined before consideration of any departure provision in the Guidelines Manual or any variance.” § 1B1.10 n.1(A) (emphasis added). A commentary provision—such as Application Note 1, “which functions to interpret a

1 guideline or explain how it is to be applied”—is binding as long as the Commentary does
2 not conflict with the Constitution, a federal statute, or the guideline at issue. *Stinson v.*
3 *United States*, 508 U.S. 36, 42-43 (1993) (internal quotation marks and alterations omitted).
4 Thus, the Court may not factor in a “fast-track” or any other departure into the amended
5 guideline range unless an exception exists.

6 The exception to this rule is found in § 1B1.10(b)(2)(B). Under § 1B1.10(b)(2)(B),
7 reductions “comparably less than the amended guideline range” are permitted only in cases
8 where the original term of imprisonment was below the applicable guideline range
9 “pursuant to a government motion to reflect the defendant's substantial assistance to
10 authorities.” *Id.* § 1B1.10(b)(2)(B). Every circuit court that has addressed the issue agrees
11 that § 1B1.10(b)(2)(B) bars a district court from lowering a defendant's below-guideline
12 sentence unless the departure at his original sentencing was based on his substantial
13 assistance to the government. *See United States v. Berberena*, 694 F.3d 514, 518-19 (3rd
14 Cir. 2012); *United States v. Anderson*, 686 F.3d 585, 588 (8th Cir. 2012); *United States v.*
15 *Glover*, 686 F.3d 1203, 1207 (11th Cir. 2012); *accord United States v. Colon*, 707 F.3d
16 1255, 1258 (11th Cir. 2013); *United States v. Lizalde*, 502 Fed. Appx. 655, 657 (9th Cir.
17 2012) (unpublished); *United States v. Beserra*, 466 Fed. Appx. 548, 550 (7th Cir. 2012)
18 (unpublished).

19 A § 5K3.1 “fast-track” motion is not a motion for substantial assistance. Unlike a
20 substantial assistance motion, it is limited to four levels and must be made pursuant to an
21 early disposition program authorized by the Attorney General and the United States
22 Attorney for the district in which the court resides. Unlike § 5K1.1, it does not require
23 “substantial assistance in the investigation or prosecution of another person.” In addition,
24 Note 3 to § 1B1.10 omits a § 5K3.1 motion as one for substantial assistance. Note 3
25 specifically provides that “[t]he provisions authorizing such a government motion are
26 § 5K1.1; (2) 18 U.S.C. § 3553(e); and (3) Fed R. Crim. P. 35(b).” *Id.* n.3. Further, a
27 defendant’s “amended guideline range” does not incorporate previously granted departures
28 for age under § 5H1.1, family ties under § 5H1.6, and mitigating circumstances under

1 § 5K2.0 as they also do not qualify as “substantial assistance departures.”

2 Ultimately, the Commission decided to impose a “single limitation applicable to
3 both departures and variances” in order to “avoid unwarranted sentencing disparities” and
4 “undue complexity and litigation.” *Hogan*, 722 F.3d at 61. This decision limits the number
5 of defendants who will be able to obtain relief under § 3582(c)(2) in light of the guideline
6 amendments. The First Circuit has commented that it is “troubled by the extent to which
7 the amended policy statement and Application Notes severely limit the number of
8 defendants . . . who will be able to obtain relief” but recognized that “in these instances the
9 district court's hands [are] tied.” *Id.* at 63.

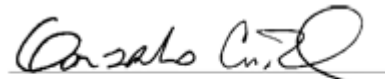
10 The present case involved the distribution of 2.04 kilograms of methamphetamine.
11 Under the guidelines in effect at the time of sentencing, the base offense level was level
12 38. The Court reduced the guidelines by 17 levels: 4 levels based upon mitigating role
13 (§ 2D1.1(a)(5)); 2 levels for minor role (§ 3B1.2(b)); 2 levels under for safety valve
14 (§ 2D1.1(b)(16)); 3 levels for acceptance of responsibility (§ 3E1.1(a) & (b)); 2 levels for
15 “fast-track” resolution (§ 5K3.1); and 3 levels for age, family ties, and mitigating
16 circumstances. The Court found that the adjusted offense level was 21 and the applicable
17 guideline range was 37 to 46 months.

18 Applying the amended base offense level provided by Amendment 782, the base
19 offense level is 36. Leaving all other guideline application decisions unaffected and
20 removing departures and variances results in a reduction of 10 levels: 3 levels based upon
21 mitigating role (§ 2D1.1(a)(5)); 2 levels for minor role (§ 3B1.2(b)); 2 levels for safety
22 valve (§ 1D1.1(b)(16); and 3 levels for acceptance of responsibility (§ 3E1.1(a) & (b)).
23 The adjusted offense level is 26, the Criminal History Category is I and the applicable
24 guideline range is 63 to 78 months. In the instant case, Defendant received a below-
25 guideline sentence based on “fast-track” and a combination of circumstances departures,
26 not substantial assistance to the government. To obtain relief under § 3582(c), the
27 guideline amendments at issue must “lower[]” a defendant's applicable guideline range.
28 U.S.S.G. § 1B1.10(a)(2)(B) (“A reduction in [a] defendant's term of imprisonment is not

1 consistent with this policy statement and therefore is not authorized under 18 U.S.C.
2 § 3582(c)(2) if . . . [the amendment] does not have the effect of lowering the defendant's
3 applicable guideline range"). Here, they do not. Defendant's amended guideline range is
4 63 to 78 months and he received a below-guideline sentence of 37 months. Since the lower
5 limits of the amended guideline range is higher than the original sentence, Defendant is
6 ineligible for modification of his sentence.

7 Accordingly, the Court **DENIES** Defendant's motion for a sentence reduction under
8 18 U.S.C. § 3582(c)(2).

9 Dated: October 20, 2015


10 Hon. Gonzalo P. Curiel
11 United States District Judge
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